VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 80-9
DENNIS MURPHY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 1, 1980, the Vermont Labor Relations Board issued its Findings of Fact, Opinion, and Order in this case. 3 VLRB 265. The Board decision was subsequently appealed to the Supreme Court by the Vermont State Employees' Association ("VSEA") on behalf of Dennis Murphy ("Grievant"). The Court found the Board had improperly sustained the dismissal of Grievant by the State without finding supporting just cause. In re Dennis J. Murphy, 140 Vt. 561. In reversing and remanding the case to the Board for further proceedings, the Court stated:

> This decision clearly fails to differentiate between a dismissal for misconduct and a termination based on physical inability to perform assigned duties. The difference in consequences is significant, and important to an employee both financially and as part of his employment history.
>
> In this case the grievant was seeking to contest his dismissal for disciplinary reasons. This was the issue which the Labor Board was duty bound to address. From the findings and conclusions it is clear that the board's action in dismissing the grievance is unsupported by its own findings and inconsistent with its conclusions. The matter must be returned for reconsideration of the issue raised by the grievance, which is not the right of the state to terminate the grievant's employment under the contract, but the right to dismiss him on disciplinary grounds.

A hearing on remand was held before the full Board June 3, 1982, at the Board hearing room in Montpelier. Grievant was represented by VSEA Attorney Michael R. Zimmerman. Assistant Attorney General Scott Cameron represented the State. The parties stipulated Chairman

Kimberly Cheney, who had disqualified himself from the case in a prior proceeding, could sit on the case on remand if in his own judgment he was free of any conflict. Mr. Cheney did not disqualify himself.

Requested Findings of Fact and Memoranda were filed by VSEA and the State on June 21 and 22, 1982, respectively.

FINDINGS OF FACT

1. Incorporated herein by reference are the Board's Findings of Fact dated July 1, 1980.

2. At the time of his dismissal Grievant's prior on-the-job injuries made him physically unable to perform the duties of Psychiatric Technician Day Charge on Weeks II without risk of further injury to himself. There were no avoidable and correctable working conditions which the employer could devise to protect Grievant from harm. The job was inherently risky, and Grievant, because of his disability, inherently subject to severe injury.

3. Following his dismissal on December 28, 1979, Grievant was continuously unemployed until January 19, 1981, at which time he was rehired by the State of Vermont, Department of Mental Health, Vermont State Hospital, as a Psychiatric Technician A (Pay Scale 7) (Grievant's Exhibit 45).

4. During the period of his unemployment, Grievant received $4,251.00 in unemployment compensation (Grievant's Exhibit 40).

5. From January 23, 1980, to February 26, 1980, Grievant incurred medical expenses in the amount of $1,974.10. A portion, if not all, of such expenses would have been paid by the State Employee Group Health Plan in effect at the time had Grievant been an employee of the State at the time such expenses were incurred (Grievant's Exhibits 41, 42, and 46).

6. At the time of his dismissal, Grievant's gross weekly pay as a Psychiatric Technician Day Charge (Pay Scale 6) was $195.00. At the time of his re-hire (i.e., on January 19, 1981) as a Psychiatric Technician A (Pay Scale 7), Grievant was assigned a gross weekly pay of $159.50. Because of his previous dismissal, Grievant was not deemed eligible for restoration rights, and was required to serve a six-month period of probation (Grievant's Exhibits 45 and 47).

7. If Murphy had not been dismissed and had he remained in his Psychiatric Technician Day Charge position, he would have made $11,547.56 between December 28, 1979 and January 19, 1981 (Grievant's Exhibit 48).

8. Between the period of his re-hire, January 19, 1981, and April 1, 1982, the difference between what Murphy made and what he would have made if he had not been dismissed was $4,512 (Grievant's Exhibit 48).

OPINION

At issue on remand are two issues: 1) whether just cause existed for Grievant's dismissal for misconduct; and 2) the proper remedy if no such just cause is found.

I. Just Cause

The December 28, 1979, letter notifying Grievant he was dismissed stated the following reasons for dismissal: "gross neglect of duty, refusal to obey a lawful and reasonable order given by a supervisor, and gross misconduct".

When this case first came before the Board, neither party asked us to consider whether the reasons for dismissal were justifiable. Instead, the Board was asked to decide whether Grievant's dismissal was lawful in view of his handicapping injury. We concluded that it was, but were not then asked to decide the issue now before us.

It is clear the reasons stated in the dismissal letter cannot be supported. Indeed, both parties agree no just cause existed for Grievant's dismissal for the reasons cited in the dismissal letter and even if there was no agreement, however, our earlier case plainly holds Grievant's dismissal for disciplinary reasons cannot be sustained.

Grievant was charged with refusal to obey a lawful and reasonable order given by a supervisor. In Grievance of Swainbank, 3 VLRB 34, at 46-47 (1980), [Reversed on factual grounds 140 Vt. 33 (1981)], we stated:

> (D)isobedience of a direct order...to be sustained (requires)... proof of intentional defiance or proof that the employee deliberately substituted his judgment for that of his superior in circumstances where it was unreasonable to do so... The legal analysis here is similar to that required when an employee refuses to do a particular job for fear of his own safety. Then the employee's refusal will be evaluated to determine whether valid safety reasons exist which will excuse compliance with an order.

The order Grievant disobeyed was a directive to work at a job he was physically unable to do without risk of further injury to himself. Thus, it was not unreasonable for him to refuse to report for duty; he was acting out of an understandable fear for his safety.

Grievant also is charged with gross neglect of duty and gross misconduct in refusing to report for duty. The facts indicate neither neglect nor misconduct on Grievant's part. Instead, like the grievant in Grievance of Harold Janes, 4 VLRB 319 (1981), Grievant failed to report to work for medical reasons.

Accordingly, we do not find just cause for dismissal based on misconduct as stated in the dismissal letter.

II. Remedy

Finding no support for the stated reasons for dismissal, the next consideration is what remedy Grievant is entitled to as a result of the State's failing.

The State's position is as follows: the State had no choice but to terminate Grievant since he could not perform the functions of his job. However, they chose the wrong method of terminating him; he should have been "removed" from his position, not dismissed. cf. Grievance of Richard Harrison, 2 VLRB 304 (1979). Rev. on other grounds, ___ Vt. ___ (1982). Grievant is not entitled to reinstatement and back-pay since it has not been demonstrated he can now or could at any time subsequent to his dismissal perform the duties of his job. The proper remedy here, the State concludes, is the dismissal letter should be removed from Grievant's personnel file and replaced with a letter of "removal" indicating Grievant was removed from his position for medical reasons; and Grievant should be given two week's pay in lieu of notice.

Grievant maintains that since the Board itself in Grievance of Swainbank, supra, has adhered to the principle that the letter imposing discipline represents an election, binding on the State, to grant the remedy suggested by the State would be contrary to the Board's own precedent. In essence Grievant argues that since the State's stated reasons for dismissal are not supported, Grievant must be reinstated and awarded back-pay and other damages.

In Swainbank, we held that in reviewing disciplinary actions we may not look beyond the specific reasons given for the disciplinary action taken. We do not believe the rationale in Swainbank applies here.

It is evident that Grievant's supervisor believed the only way an employee could be terminated was pursuant to the contractual disciplinary procedures. But this case is not truly a dismissal based on misconduct, where notions of precision in stating offenses have constitutional due process antecedents. The reasons given in the dismissal letter were an effort to fit uncontested facts into an inapplicable contract provision. The facts demonstrate the real reasons for terminating Grievant were not due to the stated reasons of misconduct, but because he simply could not perform the functions of his job. This point has been agreed upon throughout these proceedings by both parties.

Although the State breached the contract by dismissing Grievant on disciplinary grounds, it does not follow that he should be reinstated with back-pay. There was just cause for terminating Grievant because of his inability to do his job. Impliedly, the contract seems to provide an employee will only be separated from State service if he is guilty of misconduct. Article XV, Disciplinary Action, is the only contract article dealing with terminating employees and it refers solely to dismissal for disciplinary reasons. However, the Personnel Rules and Regulations provide for other ways of terminating employees, and they are part of the contract since they have not been changed through negotiation. Grievance of Richard Harrison, supra.

One of the methods of separating employees provided for in the Personnel Rules is "removal". Removal is defined in Section 2.0383 of the Personnel Rules as "the separation of an employee from a position for failure to report to duty".

We believe removal, rather than dismissal, would have been the proper action to take in Grievant's case. It is undisputed that at the time of his dismissal Grievant failed to report for duty because he could not perform the functions of his job due to a medical condition. Also, Grievant's argument in the earlier proceeding before the Board that he was a "qualified handicapped person" protected from discharge, which argument was not accepted by the Board, was not raised before the Supreme Court and we assume the parties agree with that portion of our earlier opinion. Thus, with the handicapped issue removed, Grievant has no legal right to his position. We are left with the conclusion there was just cause for removing Grievant from the position; a conclusion implicit in our earlier decision.

In situations like this, where the employee cannot perform the functions of his job and it is unlikely he will be able to in the near future, yet refuses to quit, removal is not only proper, but probably necessary to the efficient operation of an agency or department. Grievance of Richard Harrison, supra. Grievance of Janes, supra.

In sum, the State was faced with a situation where they had to terminate Grievant but simply chose the wrong method of doing so.

In remedying improper dismissals, we are instructed by the Supreme Court that the remedy to be applied for such a contractual breach is governed by contract law, not the Board's views on appropriate principles of social behavior. In re Grievance of Richard Harrison, ___ Vt. ___ (April 16, 1982). The measure of damages for a breach of contract is to restore the person to the position he would have been in had the contract not been breached. Sheldon v. Northeast Developers, 127 Vt. 15 (1968). Trask v. Granter, 135 Vt. 465 (1977).

Here, the dismissal was improper to the extent the wrong reasons were given for separating Grievant from State service. However, at the time of his dismissal, he could not perform the functions of his job and there was no reasonable expectation he could do so in the near future, so he is not entitled to reinstatement and back-pay. Further, there is no evidence before us the reasons stated in the dismissal letter in any way affected his employment prospects; nor is there any evidence he incurred any costs in clearing his good name. Accordingly, we do not believe Grievant is entitled to monetary damages on that account. cf. Vermont State Colleges Faculty Federation and Michael Peck, 4 VLRB 334 (1981).

In restoring Grievant to the position he would have been in had the contract not been breached, we believe what Grievant is entitled to under the contract is a separation notice stating the facts as they exist and the right reason for his separation from State employment. Also, because he was dismissed without notice or two week's pay in lieu of notice, he is entitled to receive a sum equal to two week's wages.

ORDER

Now, therefore, based on the foregoing Findings of Fact and for the foregoing reasons, it is hereby ORDERED:

1) The grievance of Dennis J. Murphy is ALLOWED; and

2) the dismissal letter of December 28, 1979, is to be immediately removed from Grievant's personnel file and destroyed and be replaced with a letter indicating Grievant was removed from his position due to being physically unable to perform the duties of his job without risk of further injury to himself. The letter shall be submitted to the Board within two weeks of the date of this Order; and

3) Grievant shall receive from the State a sum equal to two week's wages based upon Grievant's gross weekly salary of $195.00 at the time of his dismissal.

Dated this 4th day of July, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William A. Hemsley, Sr.

James S. Gilson

Appealed to Sup. Ct.